No. 77-1624

In the Supreme Court of the United States

OCTOBER TERM, 1978

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
PETITIONER

v.

SEACOAST ANTI-POLLUTION LEAGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
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Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 572 F.2d 872.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1978.[1] The petition for a writ of

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[1] Because petitioner has not appended a copy of the judgment of the court of appeals to the petition, we have reproduced it as an addendum to this brief.

certiorari was filed on May 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Where the Administrator of the Environmental Protection Agency has elected to comply with a decision of the court of appeals requiring him to conduct certain additional administrative proceedings, and where the Administrator is satisfied that those proceedings can be completed quickly and may result in the addition of useful information to the administrative record, whether this Court should grant certiorari to review asserted errors by the court of appeals in requiring those additional proceedings.

STATEMENT

Petitioner, the lead member of a group of electric utilities that is constructing a nuclear generating station in Seabrook, New Hampshire, applied to the Environmental Protection Agency (EPA) for a permit under Section 402 of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 880, 33 U.S.C. (Supp. V) 1342, which would allow it to discharge heated water into the Hampton-Seabrook Estuary. Because the station's proposed cooling system would result in discharges of water at temperatures exceeding EPA's applicable effluent limitations, petitioner also applied for a variance from those effluent limitations under Section 316(a) of the Act, 86 Stat. 876, 33 U.S.C. (Supp. V) 1326(a).

In 1975 EPA's regional administrator held a nonadjudicatory hearing on the application, after which he approved, with certain conditions, petitioner's proposed cooling system (Pet. App. 3, 22). Later, however, the regional administrator ordered additional adjudicatory hearings, which were held before an administrative law judge who received evidence and prepared a certified record (Pet. App. 23). As a result of those adjudicatory hearings, the regional administrator revoked his earlier approval and denied petitioner's application (Pet. App. 3, 23). Petitioner appealed this decision to the Administrator of the Environmental Protection Agency. In June of 1977, the Administrator reversed the regional administrator's denial of the application and reinstated, with certain modifications, the regional administrator's original determination approving the cooling system (Pet. App. 4, 20, 65-66).

Respondents Seacoast Anti-Pollution League and Audubon Society of New Hampshire, which had participated in the administrative hearings, petitioned the court of appeals for review of the Administrator's June 1977 decision. The court of appeals vacated that decision and remanded the case to the EPA with directions for supplemental proceedings (Pet. App. 1-19).

Without ruling on the merits of the Administrator's decision (see Pet. App. 19), the court held that the EPA had not satisfied certain procedural requirements imposed by the Administrative Procedure Act (APA), 5 U.S.C. 556(e).

First, the court held that the APA's procedural requirements for adjudicatory proceedings were applicable to this proceeding by virtue of Sections 316(a) and 402(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1326(a) and 1342(a). Both of those sections provide for a "public hearing," and the court concluded that the hearings contemplated by Congress under those sections, on applications such as those filed by petitioner for a discharge permit and a variance from effluent standards, were adjudicatory in nature. Hence those applications were "required by statute to be determined on the record * * *" within the meaning of the APA (5 U.S.C. 554), and hence the APA's procedural requirements for adjudicatory hearings (5 U.S.C. 554, 556-557) were applicable (Pet. App. 4-10).

Applying those requirements, the court held that the Administrator had relied on "extra-record evidence for important facts" (Pet. App. 16 n. 19), in violation of Section 556(e), by assembling a six-member panel of EPA technical experts to assist in his review of the record and making use of the panel's report in reaching his decision (Pet. App. 16-18). Noting that no party had been given the opportunity to comment on the panel's report prior to the Administrator's decision, the court remanded the case to the Administrator for a choice of further proceedings:

> The Administrator will have the options of trying to reach a new decision not dependent on the panel's supplementation of the record; of

> holding a hearing at which all parties will have the opportunity to cross-examine the panel members and at which the panel will have an opportunity to amplify its position; or of taking any other action within his power and consistent with this opinion. [Pet. App. 19; footnote omitted.]

The court of appeals also held that the Administrator had violated the "public hearing" requirement of Section 316(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1326(a), in connection with his receipt of certain supplemental information from petitioner (Pet. App. 13-14). The Administrator had allowed other parties to submit written comments on the supplemental information but had concluded that an additional public hearing was not warranted (Pet. App. 11-12). The court of appeals stated: "We do not believe that an opportunity to submit documents constitutes a public hearing" under Section 316(a) (Pet. App. 13). But the court was uncertain whether any purpose would be served by ordering a hearing on remand, since the Administrator had not determined whether "cross-examination would be useful" to test the supplemental information submitted by petitioner (Pet. App. 13-14). The court therefore directed the Administrator to make that determination and, if he found that a useful purpose would be served, to provide a hearing on the information (Pet. App. 14-15).

On March 20, 1978, the Administrator issued a notice announcing "the steps EPA will take to com-

ply with the remand order" of the court of appeals (Pet. App. 149-158). He stated that he would convene a supplementary evidentiary hearing at which members of the original technical panel would be made available for cross-examination, and at which the administrative record would be reopened for receipt of any evidence "that may be useful * * * in reaching a decision on the merits" (Pet. App. 150). The Administrator noted that "there is the potential for major gains, and small costs, in allowing this opportunity to supplement the record." *Ibid.* He added that the "original record" in this case "will automatically become the initial part of the record in these [supplemental] proceedings," and that "the parties need not reintroduce evidence which is part of the original record" (Pet. App. 154). The Administrator expressed the view that, by allowing limited supplemental hearings within the guidelines he established, the case would be brought "to a speedy conclusion" (Pet. App. 158).

Petitioner subsequently obtained leave of the court of appeals to file a petition for rehearing out of time and alternatively moved for a recall of the mandate. The petition and motion were denied without opinion on April 21, 1978 (Pet. App. 144, 174). Since that time, petitioner has not applied to any court for a stay of the EPA proceedings.

The Administrator's supplemental hearing commenced on June 26, 1978.[2]

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[2] On June 30, 1978, the Nuclear Regulatory Commission, in a proceeding captioned *In The Matter of Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 & 2)*, Dkts. Nos. 50-443, 50-444, suspended its construction permits for the Seabrook station, effective July 21, 1978, to enable the Commission to consider alternatives to the Seabrook site in the light of the possible outcomes of the supplemental EPA proceedings.

ARGUMENT

In view of the willingness of the Administrator of the Environmental Protection Agency to conduct a limited supplemental hearing in this case, the decision of the court of appeals poses no issue warranting review by this Court at this time. We do not concede the correctness of the holding of the court of appeals that Sections 316 and 402 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1326 and 1342, require adjudicatory hearings in compliance with the procedural standards of the Administrative Procedure Act, 5 U.S.C. 554, 556-557. In a future case it may be appropriate to review such a holding. But we do not seek review here.

The supplemental hearings convened by the Administrator commenced on June 26, 1978. It was estimated that they would be completed in 7 to 10 days. Petitioner has not applied to any court for a stay of those hearings. The Administrator has recognized "the need to reach a speedy decision" (Pet. App. 158). There is every reason to believe that the new hearings will be completed, and a new decision rendered, before the time that this Court could complete its review of the decision of the court of appeals.

If the Administrator's forthcoming decision is favorable to petitioner, as his original decision was, petitioner's procedural objections will become moot. On the other hand, if the Administrator rescinds his approval of petitioner's proposed cooling system, any prejudicial error of law, fact, or procedure that is subject to judicial review may then be raised in the court of appeals and in this Court by petition for certiorari.

Any burden that petitioner may incur from participation in the supplemental hearing will be minimal, inasmuch as the evidence received in the prior hearing remains a part of the record and only a limited reopening of the proceeding is contemplated (Pet. App. 154).

Administrative agencies "customarily entertain petitions for * * * reopening, reconsideration, or reargument," 1 Davis, *Administrative Law Treatise*, § 8.18, p. 602 (1958). Ordinarily, the decision to reopen the record is one of administrative discretion. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514-517; 40 C.F.R. 125.36(n)(9)(ii). Where, as here, the administrative agency has concluded that a supplemental hearing will promote the public interest and may be completed quickly and without significant burden, that conclusion should not be upset, even though the grounds relied on by the court of appeals to justify its intervention may be open to question. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, No. 76-419, decided April 3, 1978, slip op. 21 ("the administrative agencies 'should be free to fashion their own rules of procedure and to pursue method[s] of inquiry capable of permitting them to discharge their multitudinous duties' ").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JULY 1978.

ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 77-1284

SEACOAST ANTI-POLLUTION LEAGUE and
AUDUBON SOCIETY OF NEW HAMPSHIRE, PETITIONERS

v.

DOUGLAS M. COSTLE as Administrator of the
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE ET AL.,
INTERVENORS

DECREE

Entered February 15, 1978

This cause came on to be heard on petition for review of an order of the Environmental Protection Agency and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The decision of the Agency is vacated and the cause is remanded to the Environmental Protection Agency for further proceedings consistent with the opinion filed this day.

By the Court:

DANA H. GALLUP, Clerk

By /s/ Francis P. Seigliano
Chief Deputy Clerk.

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